

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

JAMES DARNELL SUDBERRY,
Plaintiff/Appellant,

vs.

WARDEN, CORRECTIONAL
RECEPTION CENTER, et al.,
Defendants/Appellees.

Case No. 1:15-cv-650

Barrett, J.
Bowman, M.J.

**REPORT AND
RECOMMENDATION**

Plaintiff/appellant is a prisoner, who was incarcerated at the Correctional Reception Center in Orient, Ohio, when he commenced this action in October 2015.¹ (*See* Doc. 1). On October 28, 2016, the District Court entered a final order and judgment, adopting the magistrate judge's October 6, 2016 Report and Recommendation to dismiss the matter for lack of prosecution. (*See* Docs. 7-9). The case was dismissed because the plaintiff/appellant had failed to comply with the District Court's August 24, 2016 Order denying him leave to proceed *in forma pauperis* on the ground that he is a "three-striker" within the meaning of 28 U.S.C. § 1915(g) and directing him to pay the full \$400 filing fee within thirty days. (*See id.* & Docs. 2, 6). On November 14, 2016, plaintiff/appellant filed a *pro se* notice of appeal to the United States Court of Appeals for the Sixth Circuit and motion for leave to appeal *in forma pauperis*. (Docs. 10-11). This matter is before the Court for ruling on the plaintiff/appellant's motion for leave to appeal *in forma pauperis*. (Doc. 11).

Under the "three strikes" provision set forth in 28 U.S.C. § 1915(g), plaintiff/appellant is prohibited from obtaining pauper status for the purpose of appealing the judgment in this civil

¹ It appears from the plaintiff/appellant's most recent filing that plaintiff/appellant may now be confined at the Lebanon Correctional Institution in Lebanon, Ohio. (*See* Doc. 11).

action. *See* 28 U.S.C. § 1915(g). As the undersigned pointed out in recommending the denial of the pauper application that was filed by the plaintiff/appellant to commence this action:

Mr. Sudberry is prohibited by § 1915(g) from proceeding *in forma pauperis* because he has had more than three actions dismissed as frivolous, malicious, or for failure to state a claim upon which relief may be granted. *See, e.g., Sudberry v. Ohio Dep't of Rehab. & Corr.*, Case No. 1:05-cv-629 (S.D. Ohio Dec. 16, 2005) (Doc. 6) (dismissed for failure to state a claim for relief); *Sudberry v. Rome*, Case No. 1:07-cv-597 (S.D. Ohio Sept. 20, 2007) (Doc. 6) (dismissed as frivolous and for failure to state a claim for relief); *Sudberry v. Ohio Dep't of Rehab. & Corr.*, Case No. 1:08-cv-211 (S.D. Ohio May 21, 2008) (Doc. 7) (dismissed as frivolous and for failure to state a claim for relief). *See also Sudberry v. Jackson*, Case No. 1:11-cv-431 (S.D. Ohio Aug. 29, 2011) (Doc. 4, 6) (dismissing case pursuant to three-strikes provision); *Sudberry v. Warden*, Case No. 1:10-cv-102 (S.D. Ohio March 4, 2010) (denying plaintiff's *in forma pauperis* application pursuant to three-strikes provision); *Sudberry v. Morgan*, Case No. 1:14-cv-163 (S.D. Ohio Feb. 10, 2015) (Docs. 2, 9) (adopting Report and Recommendation to deny plaintiff's *in forma pauperis* application pursuant to three-strikes provision). As in prior cases filed by plaintiff with this Court, plaintiff's previous dismissals prevent him from obtaining pauper status in the instant action.

(Doc. 2, at PAGEID#: 41).

Because plaintiff/appellant has more than three strikes against him, he is prohibited by 28 U.S.C. § 1915(g) from obtaining pauper status not only in the proceeding before this Court, but also on appeal to the Sixth Circuit from the District Court's final order and judgment dismissing the action for lack of prosecution. Accordingly, for the same reasons given for denying the plaintiff/appellant pauper status in the underlying proceeding before this Court, it is hereby **RECOMMENDED** that plaintiff/appellant's motion for leave to appeal *in forma pauperis* (Doc. 11) be **DENIED**.

IT IS SO RECOMMENDED.

s/Stephanie K. Bowman
Stephanie K. Bowman
United States Magistrate Judge

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NOTICE

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to this Report & Recommendation (“R&R”) within **FOURTEEN (14) DAYS** after being served with a copy thereof. That period may be extended further by the Court on timely motion by either side for an extension of time. All objections shall specify the portion(s) of the R&R objected to, and shall be accompanied by a memorandum of law in support of the objections. A party shall respond to an opponent’s objections within **FOURTEEN DAYS** after being served with a copy of those objections. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

cbc